it has never been the subject of express definition[17] would seem to point to the fact that the Court realized that it was more or less dependent upon conditions which were constantly changing. In the realm of decided cases it may fairly be said that the constitutionality of legislation, restricting the hours of labor of women in all industries,[18] and of men in dangerous and unhealthy occupations,[19] is established. However, so far as any distinction between men and women is concerned, it is obvious that such distinction is simply a matter of degree. If women are unable to labor more than eight hours a day and retain their health, it certainly is not unreasonable to suppose that there must be a limit beyond which man cannot labor without suffering a corresponding detriment, and this irrespective of the occupation in question, though the exact number of hours would undoubtedly vary according to occupation. Moreover it is difficult to see why the constitutionality of a statute establishing a minimum wage is not to be determined by the same standards which are decisive in the consideration of an hours law. Certainly a fair living wage is just as necessary to the maintenance of health as a restraint on the hours of labor. And it is submitted that, even though the statute causes a diminution of investment returns *after they have accrued,* such an exercise of the legislative power to further the public welfare is not, merely for that reason, any more a taking of the employer's property without due process than is a restraint on the number of hours of labor.

PATENT RIGHTS AND THE ANTI-TRUST LAWS.—An analysis both of the rights granted under the patent laws and of the limitations imposed by the Sherman[1] and Clayton[2] Laws is necessary before the border line cases, involving the inevitable conflict between a statute granting monopoly and those curbing it, can be intelligently discussed.

On the one hand, it is unquestioned that patent monopolies under certain circumstances are sanctioned under the laws, but the true nature of the right is often misunderstood. A patentee acquires only the right to exclude others from making, using, or vending the article embodied in his patent.[3] The right to make, use, and sell he already has before acquiring his monopoly. These three rights of exclusion may be separately or together relaxed by the patentee so that others may enjoy partially the benefit of the monopoly.[4] It was originally considered that, as the patentee might withhold his patent altogether from the public,[5] he might grant it on any terms, no matter

[17]See Davidson *v.* New Orleans, *supra*; Freeland *v.* Williams (1889) 131 U. S. 405, 9 Sup. Ct. 763; Brown *v.* New Jersey (1899) 175 U. S. 172, 20 Sup. Ct. 77.

[18]Muller *v.* Oregon, *supra*; Ritchie & Co. *v.* Wayman (1910) 244 Ill. 509, 91 N. E. 695; Miller *v.* Wilson, *supra.*

[19]Holden *v.* Hardy, *supra*; Baltimore & O. R. R. *v.* Int. Com. Comm. (1911) 221 U. S. 612, 31 Sup. Ct. 621; State *v.* Cantwell (1904) 179 Mo. 245, 78 S. W. 569.

[1]26 Stat. 209 (1890).

[2]38 Stat. 730 (1914).

[3]Patterson *v.* Kentucky (1878) 97 U. S. 501; see Bloomer *v.* McQuewan (1853) 55 U. S. 539.

[4]*Cf.* Adams *v.* Burke (1873) 84 U. S. 453.

[5]Paper Bag Patent Case (1908) 210 U. S. 405, 28 Sup. Ct. 748.

how unreasonable.[6] It is this latter view which is at present undergoing change.

In contradistinction to the statutes governing patents, the Sherman and Clayton acts represent the opposite tendency toward curbing monopoly. The Sherman Law, as interpreted by the Supreme Court,[7] condemns those restraints of trade which are unreasonable, and those only, while, under the Clayton Law, it is unlawful for any person to lease or sell any goods or other commodities on condition that the lessee or purchaser shall not use the goods with supplies or other commodities of a competitor where the effect of such lease shall be substantially to lessen competition or tend to monopoly.[8] How far these restrictions are to extend has become a question of increasing importance, and in consequence the recent United States Supreme Court cases of *Straus* v. *Victor Talking Machine Co.* (Oct. Term, 1916, No. 374, decided April 9, 1917) and *Motion Picture Patents Co.* v. *Universal Film Manufacturing Co.* (Oct. Term, 1916, No. 715, decided April 9, 1917) in which this conflict of opposing policies was resolved in each instance against the patentee, are of particular interest. The questions arose over how far the rights of the patentee extend in regard to restrictions on the resale price and on the right of user after the patented article has been resold.

In the first case, the Victor Company by a "license notice" declared that the machine was licensed for use for the term of the patent having the longest time to run and might be used only with sound records and needles of the plaintiff. Only the right to use for demonstrating purposes was granted to the distributors and they might assign the like right to the public or to regularly licensed Victor dealers. The latter, on payment of a royalty of not less than two hundred dollars, could grant a right of use to the public, provided the grant were made to the public only at a price fixed by the plaintiff. At the expiration of the patents the Victor was to become the property of the ultimate purchaser outright. The defendants, being partners in R. H. Macy & Co., had bought the machines and were selling them in defiance of any price restrictions. In an action for an injunction brought by the Victor Company to restrain the defendants from selling the machines and violating the patents, the Court held that the attempt to create price restrictions by license notices was invalid and that a license notice was a mere attempt to cover a sale, which, if consummated, in the Court's view could give to the patentee no further

[6]Commercial Acetyline Co. *v.* Autolux Co. (C. C. 1910) 181 Fed. 387, 391,—"The government has left the matter of tribute entirely to the patentee and the public with whom he must deal." National Phonograph Co. *v.* Schlegel (8 C. C. A. 1904) 128 Fed. 733, 735,—"it rests with the owner to say what part of this property he will reserve to himself and what part he will transfer to others and upon what terms he will make the transfer." *Cf.* Bement *v.* National Harrow Co. (1902) 186 U. S. 70, 91, 22 Sup. Ct. 747,—"the very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts."

[7]United States *v.* Standard Oil Co. (1911) 221 U. S. 1, 60 *et seq.*, 31 Sup. Ct. 502. The Sherman Law does not apply to the strict patent monopoly. Henry *v.* A. B. Dick Co. (1912) 224 U. S. 1, 32 Sup. Ct. 364.

[8]38 Stat. 731.

right to restrict the resale price.[9] A sale need not necessarily terminate the vendor's hold over the chattel.[10] Furthermore, the right to exclude others from the sale of a patented article must not in this connection be confused with the sale of the tangible article itself.[11] In case of unrestricted sale the latter would pass out of the limits of the monopoly,[12] and into the purview of the anti-trust acts, but the right to exclude others from selling articles is not subject to any supposed rule that when a thing is once sold the vendor may not still retain a qualified hold on it in the hands of third persons.[13] Consequently it would seem that the only way to uphold the decision in the Victor case is on the ground that such a restriction, even though attached to a patented article, is an unreasonable and therefore unlawful restraint of trade.

The wisdom of the decision from an economic as well as from a legal viewpoint must be questioned, if the sale price fixed was reasonable. That there is enlightened opinion against the Court's view is shown by the urging at the last session of Congress of the Stevens Price Maintenance Bill allowing such restrictions.[14] The result of price cutting such as that practiced by Macy has been to drive small retailers out of business with a consequent damage to the manu-

[9] If Bauer & Cie. *v.* O'Donnell (1913) 229 U. S. 1, 33 Sup. Ct. 616, was to be sustained, the Court could not decide the principal case otherwise. The former case decided that if a sale of the patented article was made, the resale price could not be fixed by the patentee. The license to use in the principal case is undoubtedly an attempt to avoid what is by clear implification a sale, by the use of terms which would indicate a license.

[10] The rule applied in the principal case by the Supreme Court would seem to deny the possibility of such a thing as a conditional sale, and yet Mr. Justice Holmes, (Justices McKenna and Van Devanter concurring) in his dissenting opinion in Motion Picture Patents Co. *v.* Universal Film Mfg. Co. says, "I will add for its bearing upon Straus *v.* Victor Talking Machine Co. that a conditional sale retaining the title until a future event after delivery, has been decided to be lawful again and again by this court. Bailey *v.* Baker Ice Machine Co., 239 U. S. 268, 272."

[11] Webber *v.* Virginia (1880) 103 U. S. 344; Ford Motor Co. v. Union Motor Sales Co. (D. C. 1914) 225 Fed. 373; 15 Columbia Law Rev. 721; F. Granville Munson, Control of Patented and Copyrighted Articles after Sale, 26 Yale Law Journal, 272; *semble,* Commercial Acetyline Co. *v.* Autolux Co., *supra.*

[12] Adams *v.* Burke, *supra.* When the royalty has once been paid to a party entitled to receive it, the patented article then becomes the absolute, unrestricted property of the purchaser, with the right to sell it as an essential incident of ownership. Keeler *v.* Standard Folding Bed Co. (1895) 157 U. S. 659, 15 Sup. Ct. 738.

[13] 26 Yale Law Journal, 272. See note 10, *supra.*

[14] 64th Congress, 1st Sess. H. R. 13568. Price fixing was prevented on articles produced under secret process, Dr. Miles Medical Co. *v.* Park & Sons Co. (1911) 220 U. S. 373, 31 Sup. Ct. 376, on copyrighted articles, Bobbs-Merrill Co. *v.* Straus (1908) 210 U. S. 339, 28 Sup. Ct. 722, and on patented articles, Bauer & Cie. *v.* O'Donnell, *supra.* See 30 Harvard Law Rev. 68. The owner of a branded but unpatented article, however, may refuse to sell to the price cutter. Great Atlantic & Pacific Tea Co. *v.* Cream of Wheat Co. (D. C. 1915) 224 Fed. 566, aff'd (2 C. C. A. 1915) 227 Fed. 46. See Rome G. Brown, The Right to Refuse to Sell, 25 Yale Law Journal, 194.

facturer.[15] It certainly appears just, as some exponents of price fixing have maintained, that the manufacturer who by diligence has built for himself a large business dependent in the main for its success on the standardization of its products should reap the benefit of his business acumen.[16] The result of price cutting is that the small retailer refuses to buy the products of the manufacturer. The practice in itself is a means used to acquire monopoly.[17]

In the Motion Picture Patents case the plaintiffs had acquired a patent called a "Latham Loop" which was necessary on all projecting machines used for showing motion pictures. It was sold with a restriction notice that it was to be used only with films supplied by the plaintiff corporation. The defendant was using it in connection with two films produced by firms other than the plaintiffs. The Court, in passing on the restrictions, held that they were an illegal attempt to extend the patent monopoly to commerce in unpatented articles.

Even if the restrictions were not justifiable merely as an exercise by the patentee of the monopoly rights granted him by the statute, the further test of whether an *unreasonable* restraint of trade within the Sherman act was accomplished should be applied. It will be seen at a glance that in this case an *unreasonable* monopoly was created in the business of producing moving pictures.[18] There was therefore a fundamental distinction between this and the Dick case[19] in which no monopoly on unpatented articles except in a very narrow field was created.[20] Judged from economic standards,[21] no harm is done to the public if the machine, *i. e.* the mimeograph in the Dick case, is sold at cost and the accompanying product, *i. e.* the paper and ink, at a reasonable price, but there must be enough competition in the other branches of the manufacture of paper to establish the reasonable price.[22] The public is clearly benefited by acquiring the mimeograph at cost

[15]Charles Thaddeus Terry, Price Standardization, Pamphlet of American Fair Trade League, p. 25; E. S. Rogers, Predatory Price Cutting as Unfair Trade, 27 Harvard Law Rev. 139.

[16]Terry, *op. cit.* 19.

[17]See note 15, *supra.*

[18]Edwin P. Grosvenor, Patent Rights and The Anti-Trust Laws, 17 Columbia Law Rev. 229.

[19]Henry *v.* A. B. Dick Co., *supra.* The Court seems to have gone out of its way to overrule this case.

[20]17 Columbia Law Rev. 211. "Applying the 'rule of reason' to the Dick case it is apparent that the restriction under consideration did not tend to bring about the evils which the Sherman act was designed to prevent. The restriction left the whole world free to manufacture and sell paper and ink."

[21]This seems to be the only possible method of testing whether a restraint of trade is reasonable or unreasonable within the Sherman act. Of course to quarrel with the overruling of the Dick case because the writer does not consider the monopoly sufficiently unreasonable in that case is rather like disagreeing with the opinion of the Court on a question of fact but it is submitted that the panacea is rather to be approached through regulation than by the promulgation of a flat, unyielding rule.

[22]Otherwise the very evils which the Sherman act aimed to prevent would exist, *i. e.* a restraint which would keep up prices.

and the paper at a reasonable price.[23] Of course, the Clayton Law with its stringent provisions may have done away with the possibility of interlocking restrictions,[24] but the Court refused unfortunately to consider this case in connection with the more recent statute or to pass upon whether the law itself was retroactive. Consequently, the decision appears regrettable from a number of points of view. Perhaps the field of administration would be so vastly enlarged, in case interlocking restrictions were allowed, that the system is impossible of practical solution and ought to be subject to the rule enunciated by the Court, but if the science of administration could be so successfully developed as adequately to cope with the possible and even probable resultant abuses, the consumer, as well as the manufacturer, would clearly be the real beneficiary. The Supreme Court by these decisions seems to have accomplished a result which, beside appearing economically questionable, distinctly limits the patentee's exclusive right to make, vend, and use.

RIGHTS OF LICENSEE AGAINST THIRD PARTIES.—Every license which is not a bare excuse for a trespass has contractual or property elements connected with it upon which the rights of the licensor in law or in equity depend. Thus the giving of a right to cut and take away timber conveys not only a license but a property right in the timber as it is

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[23]The first case treating the validity of interlocking restrictions is the Button Fastener case (6 C. C. A. 1896) 77 Fed. 288, in which the patentee required the purchaser of a patented article for fastening buttons on shoes to use it only with staples made by the patentee. It was held that the buyer obtained title to the tangible machine but, as to the right to use, he was a mere licensee. Cortelyou *v.* Lowe (2 C. C. A. 1901) 111 Fed. 1005; *cf.* Rupp v. Elliott (6 C. C. A. 1904) 131 Fed. 730. This restriction has been limited to cases where the unpatented articles were not public commodities or the ordinary commodities of life. Cortelyou *v.* Johnson (2 C. C. A. 1906) 145 Fed. 933; see Crown Cork & Seal Co. *v.* Brooklyn Bottle Stopper Co. (C. C. 1909) 172 Fed. 225.

[24]One turns with regret from the decision of the District Court in United States *v.* United Shoe Machinery Co. (Mass. 1915) 222 Fed. 349, to the Missouri District Court's decision handed down in 1916 in 234 Fed. 127. In the former case the validity of interlocking restrictions was upheld where all the articles included are patented and a lower rate is given when the machines are used together. In the latter the trust was dissolved under the exceedingly stringent provisions of the Clayton act. The dissolution of this concern when the prices were shown to be reasonable and the manufacturers using the machines satisfied is certainly of doubtful value. The machines in question were those used in one part of the manufacture of the shoe and had to be carefully adjusted to one another so that the work could be continuous. Under the Clayton Law it may be that the very appearance of evil must be guarded against and that the rule of reasonable restraint has been to some extent abrogated by section three. This would be unfortunate. "To lay down a flat rule", such as this, "and enforce it though the heavens fall, smacks of a stage of our law when legal principles had not attained diversification, and the science of administration was as yet unborn." 29 Harvard Law Rev. 447. Whether this will be the ultimate interpretation of the Clayton act is still open to question. See the decision of Hough, *J.*, in Great Atlantic & Pacific Tea Co. *v.* Cream of Wheat Co. (D. C. 1915) 224 Fed. 566, and Gilbert H. Montague, The Federal Trade Commission and The Clayton Act, in "Some Legal Aspects of Corporate Financing", p. 299 *et seq.*